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FIELD OPERATIONS HANDBOOK - 6/22/90

Chapter 12

ENTERPRISE COVERAGE - FLSA

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## 12g HOSPITALS AND RELATED INSTITUTIONS, AND EDUCATIONAL INSTITUTIONS - SEC 3(s)(5)

12g00 Statutory provisions.

- (a) Sec 3(s)(5) brings within the coverage of the Act employees employed in an enterprise which "is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit)".
- (b) Effective 7/1/72, the Education Amendments of 1972 amended Sec 3(s)(5) to include preschools within the coverage of the Act. Sec 3(s)(5) as amended reads as follows:

"(5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or"

Prior to 7/1/72, employees of preschools were not covered under Sec 3(s)(5).

- (c) On June 24, 1976, the Supreme Court in the case of National League of Cities, et al. v. Usery held that the MW and OT provisions of the FLSA do not apply to State and local government employees engaged in activities which are an integral part of traditional government services. (See FOH 59d.) The Court expressly found that the following activities were among those to which these provisions do not apply: "schools, hospitals, fire prevention, police protection, sanitation, public health, parks and recreation". Additionally, there are certain activities clearly reserved for State and local governments which DOL will regard as no longer subject to MW and OT (e.g., the Courts, Legislatures and other governing bodies, tax assessor's office). The Court's decision does not discuss activities which might be regarded as "nontraditional" such as State liquor stores, and utility and transit services. The majority opinion does state that the MW and OT provisions could apply to a State's operation of a railroad. Questions which cannot be resolved because of uncertainty as to whether the function is "traditional", should be developed and referred to the RS for an opinion.
- (d) The Court's decision deals only with the MW and OT provisions of the FLSA. It is our position that the decision does not affect the application of the EP and CL provisions of the FLSA or of the ADEA to employees of State and local governments, and that the provisions continue to apply.

12g01 Hospital defined.

- (a) The FLSA does not define a hospital. However, the term "hospital" refers to those establishments commonly known as "hospitals" which primarily engaged in the offering of medical and surgical services to patients who generally remain at the establishments either overnight, several days, or for extended periods. Clinics and dispensaries are not included within the term "hospital" unless operated by a hospital in the hospital establishment.



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- (b) Based on considerations of the standards and findings of other agencies and authoritative sources it is the position of WH that any establishment described in (a) above which meets any of the following three tests should be recognized as a hospital for purposes of the FLSA:
- (1) Any establishment recognized by the U.S. department of Health, Education, and Welfare as a hospital for Medicare.
  - (2) Any establishment accredited by the Joint Commission on Accreditation of Hospitals. This Commission is located in Chicago, Ill., and is composed of representatives from the American Medical Assn., the American Hospital Assn., the American College of Physicians and the American College of Surgeons. Its function is to establish standards for hospital operations and to insure continued adherence to these standards.
  - (3) Any establishment which—
    - a. Is primarily engaged in providing, by or under the supervision of physicians,
      1. Diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons; or
      2. Rehabilitation services for the rehabilitation of injured, disabled, or sick persons; or
    - b. Is primarily engaged in providing, by or under the supervision of a physician, psychiatric services for the diagnosis and treatment of mentally ill persons; or
    - c. Is primarily engaged in providing, by or under the supervision of a physician, medical services for the diagnosis and treatment of tuberculosis;
    - d. And, in addition to meeting one of the above requirements, also satisfies the following requirements:
      1. Maintains clinical records on all patients; and
      2. Has bylaws in effect with respect to its staff of physicians; and
      3. Has a requirement that every patient must be under the care of a physician; and
      4. Provides 24-hour nursing service rendered or supervised by a registered professional nurse, and has a licensed practical nurse or registered professional nurse on duty at all times; and
      5. In the case of an institution in any State in which State or applicable local law provides for the licensing of hospitals,
        - A. Is licensed pursuant to such law, or
        - B. Is approved, by the agency of such State or locality responsible for licensing hospitals, as meeting the standards established for such licensing.

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12g02 Institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective residing on the premises defined.

Such an institution (other than a hospital) is an institution primarily engaged in (i.e., more than 50% of the income is attributable to) providing domiciliary care to individuals who reside on the premises and who, if suffering from physical or mental infirmity or sickness of any kind, will require only general treatment or observation of a less critical nature than that provided by a hospital. Such institutions are not limited to nursing homes, whether licensed or not licensed, but include those institutions generally known as nursing homes, rest homes, convalescent homes, homes for the elderly and infirm, and the like. (See also FOH 25i and 12g12.)

12g03 Preschools defined.

Effective 7/1/72, a preschool is any enterprise (as defined in Secs 3(r) and 3(s) of the Act) which provides for the care and protection of infants or preschool children outside their own homes during any portion of a 24-hour day. The term "preschool" includes any establishment or institution which accepts for enrollment children of preschool age for purposes of providing custodial, educational, or development services designed to prepare the children for school in the years before they enter the elementary school grades. This includes day care centers, nursery schools, kindergartens, Head Start programs and any similar facility primarily engaged in the care and protection of preschool children.

12g04 Elementary school defined.

FLSA Sec 3(v) defines such a school as "a day or residential school which provides elementary education, as determined under State law".

12g05 Secondary school defined.

FLSA Sec 3(w) defines such a school as "a day or residential school which provides secondary education, as determined under State law".

12g06 Veterinary hospitals.

The word "hospital", as used in the Act, refers to an institution (see FOH 12f01) for the care of sick, wounded, infirm, or aged persons. A veterinary hospital for the care of animals is not considered to be a hospital within the meaning of Sec 3(s)(5). Consequently, employees of a veterinary hospital will be covered on an enterprise basis only if the veterinary hospital meets the tests of Sec 3(s)(1) or 3(s)(2), whichever is applicable (see FOH 21a01(d)).

12g07 Head Start programs.

Employees of Head Start programs are covered under Sec 3(s)(5).

12g08 University and college employee - coverage.

- (a) The "enterprise" operating a private institution of higher education normally consists of that institution's administrative and academic offices, custodial and maintenance functions and facilities, physical plant and real estate. Many universities occupy more than one campus and many others have a number of separate schools or departments in separate geographical units. All the constituent elements relating to one or more campuses, schools or departments, the operation of which is related and performed through unified operations or common control for a common



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- (3) Provides an educational program for which it normally awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge.

12g12 Institutions for the residential care of emotionally disturbed persons.

For enforcement purposes, a private institution for the residential care of emotionally disturbed persons would come within the coverage of Sec 3(s)(5) of the Act if more than 50% of its residents have been admitted by a qualified physician, psychiatrist, or psychologist. For purposes of the 50% test, the term "admitted" includes evaluations of mental or emotional disturbance by a qualified physician, psychiatrist, or psychologist either subsequent to admission to the institution or preceding admission and being the cause for referral.

12g13 Driving schools.

Establishments engaged as a business in instructing and teaching motor vehicle driving are not bona fide educational establishments or institutions for purposes of Sec 3(s)(5) or Reg 541.215.

12g14 "Community living centers" and "halfway houses" for retarded persons.

For enforcement purposes, a private institution for mentally retarded persons, sometimes called a "community living center" or a "halfway house", would come within the coverage of Sec 3(s)(5) of the Act, if more than 50% of its residents have an IQ of 69 or less as determined on the basis of a valid test administered by a qualified professional, and a reasonable degree of "care" is being provided. An IQ of 69 or below is considered "mentally defective". "Care" may include such services as waking up residents in the morning to see that they get breakfast in time to leave for work, picking some up at night after work, special counselling, instruction in money management and health matters and generally keeping an eye on them and listening to problems. (Sec also FOH 12g02 and 12g12.)

12g15 "Care" of the aged and infirm.

- (a) Many establishments variously referred to as "retirement hotels", "retirement apartments", "homes for . . .", "senior citizens retirement homes" and the like provide residences and other services for older persons. In order to determine whether such an establishment may qualify as an "institution primarily engaged in the care of the . . . aged . . .", one of the key questions is whether "care" is provided.
- (b) The word "care" as it is used in Sec 3(s)(5) is subject to a broad interpretation and encompasses routine custodial services and attention. Institutions which care for the aged, (as well as other institutions which care for the sick, or for the mentally ill or defective), can vary from extremely well-serviced establishments to those of a custodial type of servicing. Where an establishment must take full responsibility of any nursing home or hospital care a resident requires, this constitutes "care" of the resident. However, it does not necessarily follow that to be a home for the aged, the establishment must be a nursing home or otherwise medically oriented. If the aged occupants, in addition to receiving food, shelter, and laundry, must be closely watched because

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their senile condition necessitates their being supervised and guided, even though they receive no medical attention, they may, depending upon all the facts, be receiving "care" for the aged within the meaning of Sec 3(s)(5). (See also FOH 12g02, 12g12, and 12g14.)

- (c) On the other hand, some apartment hotels and retirement homes that cater to retirees and other elderly persons who are completely ambulatory and in reasonably good health are not considered institutions primarily engaged in the care of the aged who reside on the premises. Even though such an establishment may furnish certain special services, as for example, emergency pull bells in the bathroom connected to a public address system in the office and a registered nurse on duty for an hour each day to aid tenants if they need help in taking required medication, these services may, depending upon all the facts, be just a part of a deluxe service furnished by the establishment and such establishments would not be covered under Sec 3(s)(5).

12g16 Day care homes—family owned and operated.

Certain day care homes are not covered on an enterprise basis because they are family owned and operated (see last sentence of Sec 3(s)). Typically a mother who is already caring for her own children will care for other parents' children in her residence without the aid of any regular employees other than her immediate family. Such residences are distinct establishments for purposes of the Act and are excluded from enterprise coverage by the last sentence of Sec 3(s) notwithstanding that such homes may be in some way affiliated with a covered enterprise.

12g17 Maternity homes for unwed mothers.

Private nonprofit institutions providing residential care for unwed mothers are not covered by the enterprise provisions of the FLSA, provided that the maternity home is not operated in conjunction with a hospital, covered institution, or school within the meaning of Secs 3(r) and 3(s) of the Act. There may be employees covered on an "individual" basis, however.

12g18 Institutions for neglected and dependent children.

Private nonprofit institutions providing care for neglected and dependent children are not covered by the enterprise provisions of the FLSA, provided that such institution is not operated in conjunction with a hospital, covered institution, or school within the meaning of Secs 3(r) and 3(s) of the Act. However, there may be employees who are covered on an "individual" basis.